(2)
FILED
00-544 AUG 30 2000
OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

PATRICIA KIDD,

Petitioner,

v.

DISTRICT OF COLUMBIA, *et al.*,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The District of Columbia Circuit

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

DANIEL G. JARCHO
Counsel of Record
MICHAEL J. HAUNGS
MCKENNA & CUNEO, L.L.P.
1900 K Street, N.W.
Washington, D.C. 20006
(202) 496-7500

Counsel for Petitioner

23pp

TABLE OF CONTENTS

Page

APPENDIX I: *Kidd v. District of Columbia*, Civ. Action No. 92-2897 (D.D.C. Aug. 3, 1994) (Memorandum Opinion, accompanying Order set forth as Appendix B, App. 22a) 39a

APPENDIX J: *Kidd v. District of Columbia*, Civ. Action Nos. 92-2897 & 95-611 (D.D.C. Feb. 23, 1998) (Report and Recommendation, associated with Order set forth as Appendix C, App. 24a).....52a

APPENDIX I

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PATRICIA KIDD,	Filed August 3, 1994
Plaintiff,	
v.	**Civil Action No. 92-2897**
DISTRICT OF COLUMBIA, et al.,	
Defendants.	

MEMORANDUM OPINION

Pending before the Court are the defendants' motions to dismiss the plaintiff's complaint. For the following reasons, this Court dismisses all counts with the exception of the claims of retaliation under Title VII of the Civil Rights Act of 1964 and constructive discharge, which the Court orders the plaintiff to replead.[1]

---

[1] This case was recently reassigned to a newly-appointed judge, Judge Emmet G. Sullivan. However, Judge Sullivan will not be taking office until November of 1994. The Court is mindful of the lengthy delays that have already occurred in this case. In the interests of justice, the Court will exercise its power to act on these pending motions. By acting on these motions at this time, the Court intends to assist the parties in avoiding what would otherwise be another lengthy delay in the progress of this case.

I. BACKGROUND

Plaintiff is a realty specialist with the Department of Administrative Services (DAS). She previously won a jury verdict on October 12, 1990, in the Superior Court of the District of Columbia based upon claims of sexual harassment and intentional infliction of emotional distress. The jury awarded the plaintiff monetary damages, which she has not yet received because the District of Columbia is separately appealing both the verdict and the Superior Court's decision to impose direct liability on the District. In addition, the plaintiff has various matters pending before several administrative agencies including a Workman's Compensation claim for injuries arising out of the past harassment and an appeal to the Superior Court of an adverse Office of Employee Appeals (OEA) finding.

Prior to this action (but subsequent to her initial Superior Court case), the plaintiff filed a Title VII charge of retaliation and gender discrimination with the EEOC. After reviewing the charges, the EEOC determined that the plaintiff had not been discriminated or retaliated against in any way. Its decision included a statement concluding all proceedings before the EEOC and giving the plaintiff the right to sue over Title VII matters in federal court within 90 days. Plaintiff's Complaint Ex. A.

The plaintiff then filed this action. The plaintiff expanded her allegations beyond her Title VII claims, adding claims against the District of Columbia, three lawyers involved in the initial suit, and the head of the OEA. Viewed in the light most favorable to the plaintiff, the complaint alleges that the plaintiff was the victim of retaliatory activities after the conclusion of her Superior Court case. The plaintiff, despite the Superior Court's recommendation that she be transferred to a less hostile environment, was returned

to the DAS. Once there, she was placed in a working environment filed with individuals who had full knowledge of the events that had led to her previous complaint. The plaintiff contends that these individuals, in response to her initial trial, committed a series of retaliatory gestures against her including setting purposely unreasonable deadlines, denying supervisory assistance, and preventing her from attending meetings concerning her work. The plaintiff further claims that as a result of this behavior she was forced to leave her job. Plaintiff's Complaint at 16-18.

The plaintiff initially sought the appointment of counsel and subsequently filed a motion for a temporary restraining order and a preliminary injunction with the late Judge Revercomb. In response, the defendants filed a motion to dismiss and opposed the motion for a temporary restraining order. The Court made several attempts to appoint counsel in accordance with Local Rule 702.1(a)(5)(A), but all of these attempts failed. On two separate occasions, pro bono counsel withdrew shortly after being appointed to represent the plaintiff. All subsequent efforts at locating counsel have similarly failed.

After Judge Revercomb's death, the case was reassigned to this Court. The plaintiff then filed a motion to amend her complaint to include a claim of "involuntary resignation through constructive firing." Subsequently, the plaintiff filed a second motion asking the Court to grant her previous motions for a temporary restraining order and preliminary injunction and to bar the defendant from any further opportunity to respond on the record. The plaintiff then filed a third motion asking the Court to strike the defendants' motion to dismiss and to enter a default judgment in her favor. Subsequently, the Court issued an order on October 4, 1993, lifting any stay that may have existed and ordering all parties to respond to any outstanding motions within 14 days.

It was further ordered that, unless counsel could be found, the plaintiff should proceed in the matter pro se.

Complying with this Court's Order, the plaintiff filed a response to defendants' original motion to dismiss. The defendants then filed motions opposing the plaintiff's attempt to amend the complaint, and opposing the plaintiff's motion to strike and to enter default. The defendants also filed a supplemental motion to dismiss, which prompted the plaintiff to file an additional motion to strike.

During this last series of motions, the plaintiff also sought the re-appointment of counsel, indicating that she had located an attorney willing to represent her. While the Court was in the process of attempting to appoint this attorney, the plaintiff filed a pro se motion for immediate and equitable relief. The defendant then filed a response to that motion. After this latest attempt to appoint counsel also proved fruitless, the Court required the plaintiff to proceed pro se.

On February 2, 1994, the Court issued a Memorandum Opinion denying the plaintiff's motion for immediate and equitable relief as well as the plaintiff's motion to deny the defendants further opportunity to respond to the record. The Court allowed the plaintiff to amend her complaint to include a claim of constructive discharge. The plaintiff then filed an opposition to the defendants' supplemental motion to dismiss, to which the defendants have replied.

II. DISCUSSION

Because the defendant has filed a Fed. R. Civ. P. 12(b)(6) motion, the Court accepts the plaintiff's allegations of facts in the complaint and other documents as true. Whitacre v. Davey, 890 F.2d 1168, 1168 n.1 (D.C. Cir. 1989), cert denied, 497 U.S. 1038 (1990). Furthermore, the Court has the duty in pro se to hold the plaintiff's filings to a less stringent standard than formal pleadings drafted by lawyers. The Court can dismiss a pro se pleading only when it is "beyond

doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Haines v. Kerner, 404 U.S. 519, 520-21 (1972) (quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957)). The Court will examine each of the plaintiff's various allegations to determine whether she has stated a valid claim against any of the defendants.

A. OCC Defendants

In her complaint, the plaintiff sues three attorneys at the District's Office of Corporation Counsel (OCC Defendants): Corporation Counsel John Payton,[2] Civil Division Deputy Corporation Counsel Martin L. Grossman, and Eugene Adams (the attorney who represented the defendants in the plaintiff's Superior Court trial). The plaintiff seems to claim that these attorneys were in the role of superiors to her fellow employees and therefore had the obligation, which they neglected, to inform and train fellow employees not to retaliate against her for past suits. In analyzing the plaintiff's argument, the Court will accept this as true, although it is highly unlikely that these lawyers can be shown to have had supervisory duties.

The plaintiff is correct in asserting that there are limited situations where a supervisor may be held responsible for the actions of the employees working below them. In order to state such a claim against a supervisor, it must be shown that absent effective supervision, harm was not merely foreseeable to the supervisor but was highly likely. Haynesworth v. Miller, 820 F.2d 1245, 1261-62 (D.C. Cir. 1987).

The plaintiff completely fails to indicate why these attorneys should have foreseen any alleged unconstitutional or

---

[2] The court notes that John Payton is no longer Corporation Counsel. Vanessa Ruiz is the current Corporation Counsel.

illegal actions by the DAS. The plaintiff also fails to suggest that they had the authority or duty to stop such activities. She fails to give any indication of what supervisory role the lawyers should have played or how harm could have been avoided by the lawyers. Therefore, all claims against the OCC defendants are dismissed under Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted.

B. Warren Cruise, Director OEA

The plaintiff also sues the Director of OEA, Warren Cruise. Despite a reference to this defendant in the initial pages of the complaint, the plaintiff makes no allegations that Cruise committed any specific acts of harassment, discrimination or retaliation. Furthermore, the plaintiff has pointed to no policies or procedures of the agency Cruise directs which are connected to the allegations. Therefore, the charges against Cruise are dismissed for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6).

C. District of Columbia

The plaintiff also sues the District of Columbia by naming Mayor Sharon Pratt Kelly as defendant in her claims under 42 U.S.C. § 1981, § 1983 and § 1985.[3] The Supreme Court has stated that a municipality can be sued only where the "action that is alleged to be unconstitutional implements

---

[3] While a complaint must normally name the District as a defendant if funds are to be reached, "[w]hen the realities demonstrate that the District is an intended defendant, its omission as a formal matter is [not] fatal to plaintiff's suit." Parker v. District of Columbia, 588 F. Supp. 518, 522 (D.D.C. 1983) (citing Keith v. Washington, 401 A.2d 468, 471 (D.C. 1979)). It seems clear and it is conceded by both parties that the intention in the naming of the Mayor was to sue the District. Defendants' Supplemental Motion to Dismiss at 14; Plaintiff's Opposition to Defendants' Motion to Dismiss at 5. Therefore, the Court will proceed as though the District had been formally named.

or executes a policy statement, ordinance, regulation, or decision officially adopted or promulgated by those whose edicts or acts may fairly be said to represent official policy." Monell v. Department of Social Servs., 436 U.S. 658, 690-91 (1978).

In her claim, the plaintiff is unable to satisfy the "Official Policy" requirement of Monell. Although it may be true that there are deficiencies in the District's current policies towards sexual harassment (as was shown in the first trial), the plaintiff has not alleged any facts to suggest the existence of a policy connected to the allegedly retaliatory events occurring after the Superior Court Trial. Therefore, the plaintiff's claim against the District are dismissed for failure to state a claim. Fed. R. Civ. P. 12(b)(6).[4]

D. Equal Pay Act of 1964

The plaintiff further alleges that the defendants violated the Equal Pay Act of 1964, 29 U.S.C. § 206(d), in regard to her salary. In order to establish a violation of the act, it must be shown that an employer pays different wages to employees "for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions." Brennan v. Corning Glass Works, 417 U.S. 188, 195 (1974). Beyond the plaintiff's bare assertions, she has made no specific alle-

---

[4] This Court has previously dismissed an action against the District because "in order for the District of Columbia to be liable, plaintiff is at least required to plead facts sufficient to support the inference that the officers were acting pursuant to some policy of the District." Graham v. District of Columbia, 795 F.Supp. 24, 26. (D.D.C. 1992); see Hunter v. District of Columbia, 943 F.2d 69, 74 (D.C. Cir. 1991) ("The dismissal of Hunter's claim against the District of Columbia was warranted because he alleged neither a municipal policy . . . nor any action by a District policy maker amounting to deliberate indifference").

gations to indicate that she was paid a lesser wage in comparison to other workers performing the same duties. Because the plaintiff does not in any way indicate that there was wage discrimination, this allegation must be dismissed for failure to state a claim. Fed. R. Civ. P. 12(b)(6).

E. DAS Defendants

The plaintiff alleges that the DAS defendants violated 42 U.S.C. § 1981, § 1983 and § 1985. The plaintiff further claims that the DAS defendants retaliated against her for her past Title VII activities and claims that she was constructively fired from her job.

1. § 1981, § 1983 and § 1985 Claims

The Plaintiffs fails to state a § 1981 claim because she does not allege any disparate treatment on her return to work which was based on either racial discrimination or, more importantly, that the treatment dealt with the formation of her contract. The Supreme Court has stated that § 1981 is restricted in scope to forbidding racial discrimination only in the "mak[ing] and enforce[ment] of contracts." Patterson v. Mclean Credit Union, 491 U.S. 164, 176-178 (1989).

The facts of this case are similar to those in Patterson in that, with the possible exception of the plaintiff's claim that the defendants refused to promote her, none of the conduct that she alleges—that she was not afforded training for higher level jobs, was singled out for criticism, or was retaliated against for her past complaints—involves either the refusal to make a contract with her or her ability to enforce established contract rights. Instead, the allegations against the defendants are related to post formation conduct.

As to her claim for failure to promote, the plaintiff has not supplied any allegations that she was denied advancement on the basis of racial discrimination. The wording of § 1981 clearly states that its purpose is to guarantee "the same right...to...enforce contracts...as is enjoyed by white citi-

zens." By not offering any specific claims that the plaintiff was denied promotion on the basis of her racial characteristic, the plaintiff fails to state an adequate claim under Fed R. Civ P. 12(b)(6).

Similarly, a § 1985 claim relies on discrimination against individuals based on their being part of a larger acknowledged protected group. The Supreme Court has stated "[t]he language requiring intent to deprive of equal protection, or equal privileges and immunities, means there must be some racial, or perhaps otherwise class based, invidiously discriminatory animus behind the conspirators' actions." Griffin v. Breckenridge, 403 U.S. 88, 102 (1971). The plaintiff, however, does not allege any facts suggesting this type of class based discrimination or racial motives in her assertions. For this reason the plaintiff fails in her § 1985 pleading. The claim is dismissed under Fed. R. Civ. P. 12(b)(6).

The plaintiff's 42 U.S.C. § 1983 claim also fails to meet pleading requirements. The Supreme Court has stated that in order to state a claim under § 1983 a plaintiff must allege that an individual acting under color of state law violated a right protected by the Constitution and laws of the United States. West v. Atkins, 487 U.S. 42, 48 (1988). However, nowhere in either the complaint or the other various submitted documents does the plaintiff indicate what or how her Constitutional or statutory rights were infringed by the defendants.[5] This fails to meet even the most liberal plead-

---

[5] The plaintiff does mention the Fifth and Fourteenth Amendments in her Memorandum of Points and Authorities in Opposition to Defendants Motion to Dismiss. However, beyond citing these amendments, their applicability is never explained thoroughly enough to meet even the most lenient pleading standards.

ing standards and, therefore, these claims must also be dismissed. Fed. R. Civ. P. 12(b)(6).

2. Title VII Claims

The plaintiff also alleges that the DAS defendants violated Title VII of the Civil Rights Act of 1964. Although the plaintiff's allegations in her complaint are sketchy, she appears to assert that her rights were violated under 42 U.S.C. § 2000e-3 (section 704 A) and that she maintains her right to a private cause of action under 42 U.S.C. § 2000e-5. However, the plaintiff's complaint is very unclear about the extent of the retaliation and the individuals directly responsible for many of the actions.

Although this lack of specificity may have caused a dismissal of a complaint filed by an attorney, "[p]ro se litigants are allowed more latitude than litigants represented by counsel to correct defects in service of process and pleading." Moore v. Agency for International Development, 994 F.2d 874, 876 (D.C. Cir. 1993). The United States Court of Appeals for the District of Columbia Circuit recently explained that there are some circumstances where a pro se plaintiff should be allowed to replead a complaint. In Moore, the plaintiff failed to make any specific allegations against the defendants that would satisfy the applicable heightened pleading standard. 994 F.2d at 877-878. Nevertheless, the court indicated that the district court should have informed the plaintiff of the defects in his complaint and permitted him to file an amended complaint. Id. After examining the complaint and the entire record in this case, the Court finds that, although the complaint is insufficient at the present time, there is reason to believe that the plaintiff

could produce a cognizable Title VII claim.[6] Therefore, in keeping with the spirit Moore, the Court will allow the plaintiff to replead her Title VII allegations.

Moore also discusses the "importance of providing pro se litigants with the necessary knowledge to participate effectively in the trial process." Id. In order to attempt to comply with this principle, the Court will now examine the current state of the plaintiff's complaint and try to indicate its deficiencies.

Section 704(a) of Title VII makes it illegal "to discriminate against any individual... because he has made a charge, testified, assisted or participated in an investigation, proceeding, or hearing under this subsection." 42 U.S.C. § 2000e-3, 1964. In order to establish a prima facie case under section 704(a), a plaintiff must show: 1) that he or she engaged in activity protected by the statute; 2) that the employer engaged in conduct having an adverse impact on the plaintiff; and 3) that the adverse action was casually related to the plaintiff's exercise of protected rights. Berger v. Iron Workers Reinforced Rodmen Local 201, 843 F.2d 1395 (D.C. Cir.), clarified on reh'g, 852 F.2d 619 (D.C. Cir. 1988), cert. denied, 490 U.S. 1105 (1989).

In order to meet these requirements, the plaintiff needs to more specifically explain what retaliatory acts were committed against her upon her return to the DAS. The plaintiff must also specifically indicate who committed these acts. Simply put, the plaintiff must move beyond general statements and provide the Court with specific factual allegations about the people and events that gave rise to these

---

[6] Of particular influence in the Court's decision is a comparison between the submitted complaint and a chronology provided by the plaintiff.

charges. Although it is unclear whether the plaintiff will be able to state a valid claim, the Court orders the plaintiff to replead this claim setting forth with more specificity the precise actions that form the basis for her Title VII claim. Accordingly, the defendants' motion to dismiss the Title VII claim is denied without prejudice.

3. Constructive Discharge

The plaintiff's constructive discharge claim presents the Court with similar concerns. The complaint indicates that there may be enough evidence to sustain a claim. However, the complaint is so unclear and provides so few specifics that the Court is unable to determine whether the plaintiff can state a valid claim. Therefore, the Court orders the plaintiff replead this claim.

In order to find constructive discharge in conjunction with a discrimination claim, a court must find not only intentional discrimination, but also "aggravating factors." Dashnaw v. Pena, 12 F.3d 1112, 1115 (D.C. Cir 1994) (quoting Clark v. Marsh, 665 F.2d 1168, 1174 (D.C. Cir 1981)).[7] The D.C. Circuit has permitted a constructive discharge claim in conjunction with a Title VII claim on the basis of "a continuous pattern of discriminatory treatment encompassing deprivation of opportunities for promotion, lateral transfer, and increased educational training." Clark, 665 F.2d at 1175. A thorough review of the record suggests that the plaintiff may be able to properly allege such aggra-

---

[7] Although there is no set definition of these "aggravating factors," the D.C. Circuit established general criteria in Clark. There, the court held that a "finding of constructive discharge depends on [whether the employer] deliberately made... working conditions intolerable and drove [the employee] into an involuntary quit." Clark, 665 F.2d at 1173 (quoting Retail Store Employees Union v. NLRB, 419 F.2d 329, 332 (D.C. Cir. 1968)).

vating factors. However, due to the lack of specifics in the complaint, the plaintiff has not sustained the burden needed to bring a constructive discharge claim in conjunction with a Title VII action. The plaintiff's claim must move beyond simple allegations to a higher level of specificity before it can pass even the most lenient pleading standards. Therefore, in the spirit of Moore, the Court orders the plaintiff to replead here constructive discharge claim. The defendants' motion to dismiss the constructive discharge claim is denied without prejudice.

III. CONCLUSION

In its attempt to comply with the holding of Moore, this Court will deny the defendants' motion to dismiss the plaintiff's Title VII and constructive discharge claims. The Court further orders the plaintiff to replead these claims with greater specificity by September 1, 1994. However, the Court finds that the plaintiff's other claims are so clearly meritless that they can be dismissed for failure to state a claim under Fed R. Civ. P. 12(6)(b).

/s/

August 3rd, 1994

Thomas F. Hogan
United States District Judge

APPENDIX J

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

PATRICIA KIDD, **Plaintiff,** **vs.** **DISTRICT OF COLUMBIA, et al.,** **Defendants.**	Filed February 23, 1998 **Civil Action Nos. 92-2897 & 95-0611 (CONSOLIDATED) TFH/DAR**

REPORT AND RECOMMENDATION

Pending for consideration by the undersigned United States Magistrate Judge are (1) Plaintiff's Partial Motion for Summary Judgment (Docket No. 174), and (2) Defendants' Motion to Dismiss or in the Alternative for Summary Judgment (Docket No. 175). Plaintiff is a former employee of the District of Columbia Department of Administrative Services. In October, 1990, following a jury trial in the Superior Court of the District of Columbia, plaintiff was awarded money damages and other relief with respect to her claims or sexual harassment and intentional infliction of emotional distress by two District of Columbia managers. Plaintiff also brought administrative claims, including a worker's compensation claim and an appeal of an adverse decision by the Office of Employee Appeals. See August 3, 1994 Memorandum Opinion (Hogan, J.) at 1-2. The underlying judgment, fees and interest, totaling in excess of $348,000, have since been paid, and the administrative claims have been dismissed by the Superior Court on procedural grounds. See Memoran-

dum of Points and Authorities in Support of Defendants' Motion to Dismiss or in the Alternative for Summary Judgement ("Defendants' Memorandum") at 2.

In the first of these consolidated actions, commenced prior to the payment by the District of Columbia of the judgment, interest and fees in the Superior Court case, plaintiff complained of discrimination, retaliation and constructive discharge in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq.; violation of her rights under the Equal Pay Act of 1964, 29 U.S.C. § 206(d); and violation of her rights under 42 U.S.C. §§ 1981, 1983 and 1985. The court (Hogan, J.) dismissed all of these claims with the exception of the Title VII claims of retaliation and constructive discharge. August 3, 1994 Order; see August 3, 1994 Memorandum Opinion at 14. Plaintiff thereafter filed the second of these consolidated actions, in which she alleged failure to accommodate a mental handicap in violation of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 791 et seq.

As directed by the scheduling orders of the undersigned, both plaintiff and defendants filed dispositive motions. Plaintiff moves for summary judgment in her favor.[1]

---

[1] Plaintiff's submission is captioned "Memorandum in Support of Plaintiff's Partial Motion for Summary Judgment." The submission is not accompanied by a separate motion. While plaintiff characterizes the relief which she seeks as summary judgment, she attempts to demonstrate that she can establish "a prima facie case of retaliation discrimination" and "a prima facie case of disability discrimination" under the Rehabilitation Act, thereby suggesting that she intends the memorandum to be, at least in part, an opposition to defendants' motion to dismiss or for summary judgment. See Memorandum in Support of Plaintiff's Partial Motion for Summary Judgment ("Plaintiff's Memorandum") at 12-15. Plaintiff's memorandum includes a seven page, 47 paragraph section captioned "Statement of Material Facts Not in Dispute," but no separate statement required by

(Footnote cont'd on next page)

Defendants move for dismissal pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim upon which relief can be granted or, in the alternative, for summary judgment in their favor.

Upon consideration of these motions, the memoranda of points and authorities in support thereof and the entire record herein, the undersigned will recommend that defendants' motion be granted, and that plaintiff's motion be denied.[2]

DISCUSSION

I. Applicable Standards

In evaluating a motion to dismiss, whether on the ground of lack of subject matter jurisdiction or for failure to state a claim upon which relief can be granted, all well-pleaded factual allegations of the complaint are to be construed in the light most favorable to the plaintiff. Schemer v. Rhodes, 416 U.S. 232, 236 (1974); see Fernando v. Rush-Presbyterian-St. Luke's Medical Center, 882 F. S.p. 119, 121 (N.D. Ill. 1995). Additionally, the court must accept as true all reasonable inferences to be drawn from the well-pleaded factual allegations. See, e.g.., Fernando v. Rush-Presbyterian-St. Luke's Medical Center, 882 F. Spp.. at 121.

(Footnote cont'd from previous page.)

Local Rule 108(h). See Supplemental Order entered May 15, 1996. Plaintiff's use of the word "partial" in the caption of her memorandum appears to constitute a request that she be allowed to supplement her memorandum following any appeal. See Plaintiff's Memorandum at l.

[2] Consistent with this recommendation, the undersigned, by a separate Order entered this date, determines three pending non-dispositive motions.

In determining a motion to dismiss for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6), "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief." Coney v. Gibson, 355 U.S. 41, 45-46 (1957); see Shear v. National Rifle Association, 606 F.2d 1251, 1253 (D.C. Cir. 1979). However, Rule 12(b) of the Federal Rules of Civil Procedure provides that if matters outside the pleading are presented and not excluded by the court, a motion to dismiss for failure to state a claim upon which relief can be granted shall be treated as a motion for summary judgment and decided in accordance with Rule 56.

Federal Rule of Civil Procedure 56(c) provides that summary judgment shall be granted in favor of a moving party if the record indicates that no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c). To avoid summary judgment, the non-moving party must demonstrate that a genuine dispute exists, and provide evidence sufficient for a jury to return a verdict for that party. Anderson v. Liberty Lobby Inc., 477 U.S. 242, 248 (1986); see Cheilitis Corp. v. Citrate, 477 U.S. 317, 322-23 (1986). The non-moving party may not rely upon the mere allegations or denials in its pleadings as support for its position, but rather must establish specific facts through affidavits based upon personal knowledge. See FED. R. CIV. P. 56(e).

Affidavits submitted with an opposition to a motion for summary judgment must satisfy the requirements of Rule 56 of the Federal Rules of Civil Procedure, which provides, in pertinent part, that

> [supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to

> the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by deposition, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

FED. R. CIV. P. 56(e) (emphasis added).

Additionally, Local Rule 108(h) mandates that each motion for summary judgment be accompanied by a statement of material facts as to which there is no genuine issue. This statement must be supported by references to the record. The motion must also be accompanied by a statement of points and authorities supported by specific points of law. The same rule requires that an opposition to a motion for summary judgment be accompanied by a

> separate concise statement of genuine issues setting forth all material facts as to which it is contended there exists a genuine issue necessary to be litigated, which shall include references to the parts of the record relied on to support the statement . . . In determining a motion for summary judgment, the Court may assume that facts identified by the moving party in its statement of material facts are admitted, unless such a fact is controverted in the statement of genuine issues filed in opposition to the motion.

Local Rule 108(h).

II. Findings

As the parties have presented, and the undersigned has not excluded, matters outside the pleadings, the undersigned will recommend that defendants' motion to dismiss be denied, and that both plaintiff's motion and defendants' motion be treated as motions for summary judgment. The undersigned finds that defendants have complied with the requirements of Rule 56(c) and (e) of the Federal Rule of Civil Procedure and Local Rule 108(h), but that plaintiff has not complied with these provisions in either her motion for summary judgment or her opposition to complied with these provisions in either her motion for summary judgment or her opposition to defendants' motion for summary judgment.[3] The undersigned further finds that defendants have demonstrated that there is no genuine issue as to any material fact and that they are entitled to judgment as a matter of law with respect to plaintiff's remaining claims.

More specifically, the undersigned finds that the pleadings, affidavits and other sworn testimony and the entire record show that there is no genuine issue as to any material fact concerning plaintiff's (1) non-promotion; (2) training opportunities; (3) reduced duties; (4) performance evaluations; (5) return to the agency for which she formerly worked; and (6) rights under the Rehabilitation Act. Defendants' Memorandum at 10-41. Moreover, the undersigned finds that plaintiff has failed to identify even a single material fact as to which a genuine issue for trial exists. Defendants' Opposition and Reply at 3-16. Rather, both her motion and her opposition to defendants' motion are almost

---

[3] See Defendants' Opposition to Plaintiff's Motion for Summary Judgment and Reply to Plaintiff's Opposition to Defendants' Motion for Summary Judgment (Docket Nos. 181 and 182 ("Defendants' Opposition and Reply") at 2; see also n. 1, supra.

entirely comprised of her opinions of defendants' actions and characterizations of various statutes and decisions.[4]

Finally, on the basis of the foregoing findings, and upon consideration of the applicable authorities, the undersigned further finds that defendants are entitled to judgment as a matter of law.[5]

CONCLUSION

Upon consideration of Plaintiff's Partial Motion for Summary Judgment, Defendants' Motion to Dismiss or, in the Alternative for Summary Judgment, the memoranda in support of and in opposition thereto, and the entire record herein, it is, this 23rd day of February, 1998,

RECOMMENDED that Defendants' Motion to Dismiss be denied, and that their alternative Motion for Summary Judgment (Docket No. 175) be **GRANTED**; and it is

---

[4] See, e.g., Plaintiff's Motion (Amended) Response to Defendants' Motion to Dismiss or in the Alternative, Summary Judgment (Docket No. 178) ("Plaintiff's Opposition"), ¶¶ 20, 21, 28, 36-38, 41-46. Plaintiff did not provide with her opposition the separate statement of facts as to which a genuine issue exists, as required by Local Rule 108(h).

[5] The elements of a prima facie case of retaliation and failure to accommodate are settled, well-known to the parties and indeed, not subject to dispute in these consolidated actions. See August 3, 1994 Memorandum Opinion at 11-14; Defendants' Memorandum at 8, 25, 32; Plaintiff's Opposition, ¶ 20, 26-27. Accordingly, these authorities will not be discussed in greater detail herein.

FURTHER RECOMMENDED that Plaintiff's Partial Motion for Summary Judgment (Docket No. 174) be **DENIED**.

/s/

DEBORAH A. ROBINSON
United State Magistrate Judge

Within ten days after being served with a copy, any party may file written objections to this report and recommendation. The objections shall specifically identify the portions of the proposed findings and recommendations to which objection is made and the basis for the objection. In the absence of timely objections, further review of issues decided by this report and recommendation may be waived.